# STATE PERSONNEL BOARD, STATE OF COLORADO Case No. 2005B125

#### INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

**WESLEY A. LEHMAN,** 

Complainant,

VS.

DEPARTMENT OF CORRECTIONS, ARKANSAS VALLEY CORRECTIONAL FACILITY,

Respondent.

Hearing was held on September 27, 2005, and September 28, 2005, before Administrative Law Judge Hollyce Farrell at the offices of the State Personnel Board, 633 17<sup>th</sup> Street, Suite 1320, Denver, Colorado. First Assistant Attorney General Jill M. M. Gallet represented Respondent. Respondent's advisory witness was Carl Zenon, the appointing authority. Complainant appeared and was represented by Nora V. Kelly.

## **MATTER APPEALED**

Complainant, Wesley A. Lehman (Complainant), appeals his termination by Respondent, Department of Corrections (Respondent or DOC). Complainant alleges that he should have received a corrective action before any disciplinary action could be taken and that his intoxication at work was not voluntary and did not warrant termination. Complainant also alleges that his appointing authority failed to consider information presented about Complainant's medications prolonging or intensifying the clearance of alcohol in his system. Complainant seeks reinstatement, back pay and attorney fees and costs.

For the reasons set forth below, Respondent's action is **affirmed**.

#### **ISSUES**

- 1. Whether Complainant committed the acts for which he was disciplined;
- 2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
- 3. Whether the discipline imposed was within the range of alternatives available to the appointing authority;

4. Whether attorney fees are warranted.

## FINDINGS OF FACT

## General Background

- 1. Complainant began his employment with DOC on July 7, 1986, as a Correctional Officer (CO) I. *Stipulated fact*.
- 2. Complainant was certified into the CO I position on July 7, 1987. Stipulated fact.
- 3. Complainant continued to promote during his career at DOC, and was certified as a CO V on April 1, 2004. *Stipulated fact.*
- 4. On April 14, 2005, Complainant was employed as a Major and the Custody and Control Manager at Arkansas Valley Correctional Facility (AVCF). In that position, Complainant was responsible for the management and security of 165 security positions. *Stipulated fact*.
- 5. As Major, Complainant held the number three position of authority at AVCF under the Warden and the Associate Warden. As the Custody and Control Manager, Complainant was responsible for the internal and external security of AVCF and was the tactical commander in emergency situations.
- 6. The Custody and Control Manager is entrusted to make good, sound decisions regarding the day-to-day operations of the facility.
- 7. AVCF is a 1007 bed facility. It houses inmates ranging from very violent offenders to non-violent offenders. Many of the inmates at AVCF are gang members.
- 8. Because of the nature of AVCF's population, there is a high level of tension at the facility. As such, all AVCF staff must report to work in a fit and alert condition in order to properly manage the volatile population and to respond to emergency situations.

#### **DOC AR 1450-01**

- 9. DOC has a Staff Code of Conduct which is contained in DOC Administrative Regulation 1450-01 (AR 1450-01).
- 10. The portions of AR 1450-01, which are pertinent to this case, are:

#### IV. PROCEDURES

The following rules and standards are included, but not limited to: accepted principles, expressing in general terms the conduct

expected of DOC staff. Violations of these principles may result in corrective or disciplinary action. [2-CO-1C-04] Failure to adhere to these rules and standards may also adversely affect the safety and security of the facility and the general public. The Department reserves the right to monitor staff activity to ensure compliance with this administrative regulation. Violations of these principles may result in investigation, as defined in administrative regulation 11-04, Professional Standards Investigations. [Bold and italics included in original.]

. . . .

J. Professional relationships with colleagues will be of such character as to promote mutual respect, assistance, consideration, and harmony within DOC and with other agencies.

. . .

N. Any action on or off duty on the part of DOC that jeopardizes the integrity or security of the Department, calls into question the staff's ability to perform effectively and efficiently in his/her position, or casts doubt upon the integrity of the staff, is prohibited. Staff will exercise good judgment and sound discretion.

. .

X. Staff shall neither falsify any documents nor willfully depart from the truth, either in giving testimony or in connection with any official duties or official investigation.

. .

CC. Staff are required to remain fully alert and attentive during duty hours.

TT. Use (including under the influence) of alcohol or illicit drugs, or the misuse of prescription drugs, while on duty is prohibited. Illegal possession, manufacture, use, sale, or transfer of a controlled substances is prohibited and may be subject to prosecution, except in the performance of official duties [2-CO-1C-20] [4-4063] and with prior written authorization of the executive director. Failure to submit to a urinalysis/intoximeter or saliva screening, when requested for DOC drug or alcohol testing, may result in corrective or disciplinary action, as per administrative regulation 1450-36, Employee Drug Deterrence Program and administrative regulation 1150-04, Professional Standards Investigations. [Bold and italics in original.]

. .

ZZ. Any act or conduct, on or off duty, which affects job performance and which tends to bring the DOC into disrepute, or reflects discredit upon the individual as a correctional staff, or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action.

- 11. AR 1450-01 is taught as an aspect of DOC's Professionalism training. Currently, DOC trainers teach a 5-hour course on AR 1450-01; prior to January of 2005, it was an 8-hour course. All of the above quoted sections are covered during the training.
- 12. Complainant completed an 8-hour professionalism course, which focused on AR-1450-01, in 1995. Additionally, Complainant has completed courses on becoming a DOC trainer, and has taught courses on professionalism to other DOC employees.
- 13. Complainant was aware of AR 1450-01's requirements.

#### Events of April 14, 2005

- 14. On April 14, 2005, AVCF was hosting an Emergency Response Team (ERT) challenge. Representatives from 23 DOC facilities were invited to participate in the ERT challenge, which was held to raise money and to promote camaraderie among DOC employees.
- 15. Zenon, the warden at AVCF, was scheduled to be in meetings and attend to other obligations at the facility that day. Steven Hartley, AVCF's Associate Warden, was going to be involved in the ERT challenge, which was being held on the grounds outside of the facility. Thus, Complainant was to be in charge of the facility on April 14, 2005.
- 16. The fact that Complainant was to be in charge of the facility was communicated to Complainant prior to April 14, 2005. Complainant understood the level of responsibility he would have because he had filled in for Hartley on previous occasions.
- 17. Complainant lives in Colorado Springs, which is approximately 80 miles from AVCF. He arrived at work at approximately 7:00 a.m. on April 14, 2005. His shift officially began at 8:00 a.m.
- 18. At approximately 7:20 a.m., Gary Golder, who was then the Acting Director of Prisons, arrived at AVCF to attend the ERT challenge. When Golder entered the facility, Complainant walked up to him and started talking to him.
- 19. Golder, who had previously worked with Complainant, noticed that Complainant was slurring his words and smelled of alcohol.
- 20. At approximately 8:00 a.m., Hartley arrived at the facility. Shortly after his arrival, Hartley saw Complainant. Hartley noticed that Complainant was slurring his words and was "teetering." Hartley was shocked about Complainant's obvious state of intoxication.

- 21. Hartley found Golder and told him of his observations concerning Complainant. Golder told Hartley that he had the same concerns and told Hartley that he should talk to Zenon about the situation.
- 22. Hartley found Zenon and told him he thought he should observe Complainant's behavior. When Zenon observed Complainant, he noticed that he had bloodshot eyes, alcohol on his breath and slurred speech. At that point, Zenon decided that it would be appropriate to give Complainant a breath test to determine if Complainant was intoxicated.
- 23. Zenon first called Terry Reeves, a criminal investigator for DOC assigned to DOC's Fort Lyon facility. Reeves was on his way to a Law Enforcement Coalition meeting in La Junta.
- 24. Zenon told Reeves that he believed he had a staff member who was intoxicated and that he needed Reeves to come to AVCF. After speaking with Zenon, Reeves called John "Smokey" Kurtz, a criminal investigator assigned to AVCF. Kurtz was also in route to La Junta for the meeting.
- 25. Reeves and Kurtz went to AVCF from La Junta, a drive that took approximately 45-50 minutes. When they arrived, they saw Complainant at AVCF's entrance assisting the entrance staff by checking property of individuals entering AVCF.
- 26. Both Reeves and Kurtz observed that Complainant was exhibiting signs of intoxication.
- 27. Kurtz told Complainant that he needed to see him in his office. Once inside Kurtz's office, Kurtz advised Complainant that Zenon had requested that Complainant take an alcohol test.
- 28. At approximately 9:39 a.m., Kurtz administered an alcohol test on Complainant by using an alcohol test strip. The alcohol test strip was placed in Complainant's mouth. After it was soaked with Complainant's saliva, Kurtz was able to ascertain that Complainant had alcohol in his system.
- 29. After administering the test strip on Complainant, Kurtz and Reeves took Complainant to the Otero County Sheriff's office in La Junta for a breath alcohol test using an Intoxilyzer 5000 machine. The Crowley County Sheriff's office was much closer. However, Kurtz preferred to take Complainant to the Otero County's Sheriff's office because it is cleaner and he wanted to give Complainant additional time before taking the test.
- 30. When Complainant got to the Otero County Sheriff's office, the undersheriff, Ken Kimsey, administered the breath alcohol test on him at approximately 10:30 a.m. The test revealed that Complainant had an alcohol level of .178, or over 3 times the legal limit for driving.

- 31. Complainant fully cooperated with all of the investigators' requests.
- 32. Kurtz prepared a report, as he was required to do, regarding the incident concerning Complainant.
- 33. Because Complainant was too intoxicated to drive, Hartley drove Complainant home in Complainant's car and Reeves and Kurtz followed to bring Hartley back to AVCF.
- 34. During the ride back to Complainant's home, at approximately 11:00 or 11:30 a.m., Hartley noticed that Complainant was still intoxicated.
- 35. Hartley asked Complainant if he wanted to see someone at the Colorado State Employee Assistance Program (CSEAP), and Complainant replied that he did not because he wasn't drinking and didn't know how he was intoxicated.
- 36. Complainant expressed concern to Hartley about his alcohol level because he said he had a couple of martinis the night before, but went to bed around 9:30 p.m. and didn't have any more alcohol after that time.
- 37. Later that day, Complainant called Hartley and told him he had an appointment at his doctor's office because Complainant believed his medical problems were somehow preventing his body from processing alcohol.
- 38. Zenon placed Complainant on administrative leave with pay on April 15, 2005, pending an investigation into Complainant's conduct on April 14, 2005.

### **Complainant's Medications**

- 39. Complainant did go to his doctor's office on April 19, 2005. Because his doctor was out of town, Complainant saw the physician's assistant, Doug Jeffers.
- 40. After the appointment with Complainant, Jeffers wrote the following memorandum: "The patient was seen today in the office for physical exam and a drug interaction with two of the medications he was taking and some alcohol that was consumed on Wed., April 13<sup>th</sup>. His history is one of having a breathalizer done on April 14 in the morning and had a level .187 (sic). The combination of the two medications and the interaction of the alcohol will and does prolong and intensify clearance of the alcohol as well as the two medications. The patient was not aware of the side effects and potential cary [sic] over of the alcohol in his blood stream. This was not an intentional act of drinking on the job, but rather an interaction with his medications."

- Complainant had been on two medications, Lorazepam and Temazepam, for 41. anxiety and depression since mid-December, 2004. Although they have different names, Lorazepam and Temazepam are the same drug.
- 42. Complainant faxed a copy of Jeffers' memorandum to Hartley, who showed it to Zenon. Complainant later spoke with Zenon on the phone and asked him if he had seen the memo from Jeffers. Zenon replied that he had seen it, but it wasn't going to change anything.
- 43. Complainant researched the medications he was taking on the Internet. For both Lorazepam and Temazepam, Complainant discovered the following language with respect to alcohol, "Avoid alcohol while taking lorazepam. Alcohol may increase drowsiness and dizziness caused by lorazepam. Alcohol may also increase the risk of having a seizure if lorazepam is being taken for a seizure condition. . . Lorazepam may increase the effects of other drugs that cause drowsiness, including antidepressants, alcohol, antihistamines, sedatives (used to treat insomnia), pain relievers, anxiety medicines, seizure medicines, and muscle relaxants."

## Rule R- 6-10<sup>1</sup> Meeting and Discipline

- 44. Zenon scheduled a meeting with Complainant pursuant to State Personnel Board Rule R-6-10 for May 5, 2005. Complainant chose not to have a representative at the meeting. Zenon, as the appointing authority, conducted the meeting. Hartley was also present as Zenon's representative.
- During the meeting, Zenon informed Complainant of the allegation that 45. Complainant reported for work on April 14, 2005, in an obvious state of intoxication. Complainant did not deny that he came to work intoxicated on that dav.
- 46. Zenon asked Complainant if he had any evidence or mitigating information that he wanted to provide during the meeting. Complainant explained, as he had to Hartley, that he had two or three martinis on the evening of April 13, 2005, and went to bed by 9:30 p.m. Complainant further stated that he feared he had a medical problem that was causing him to have alcohol in his system. Complainant also stated that his medication prolonged and intensified the clearance of alcohol in his system for a period of up to 48 hours. Complainant said that he did not intend to come to work intoxicated, and the intoxication was caused by his medication.

<sup>&</sup>lt;sup>1</sup> This action was filed prior to July 1, 2005. Effective July 1, 2005 there were substantial revisions to the Board's statutes and its rules. This action is analysed under the statutes and Board rules in effect prior to July 1, 2005 and all citations are to those statutes and rules.

- 47. Complainant stated in the Rule R-6-10 meeting that he did not know he was intoxicated when he drove to work on April 14, 2005, and still did not realize it when he arrived at work.
- 48. Complainant's statements regarding his medications prolonging his intoxicated state 13 hours after consuming alcohol are not credible because the documentation Complainant provided concerning his medication contained no warnings or information that it would prolong or intensify the clearance of alcohol in his system.
- 49. After considering all of the information provided to him, including the information gathered in the Rule R-6-10 meeting, Zenon determined that Complainant's conduct violated several provisions of DOC AR 1450-01, specifically, Section IV, J; Section IV, N; Section IV, X; Section IV, CC; Section IV, TT; Section IV, UU; and Section IV, ZZ.
- 50. Zenon also found that Complainant's actions and judgment placed civilians and DOC staff members at risk due to driving while intoxicated and being in a position at DOC to possibly make life or death decisions while intoxicated. Zenon further found that Complainant's behavior undermined the AVCF staff's trust and the public's trust in Complainant's ability to lead and to do his job and that Complainant recklessly endangered the staff at AVCF, the offenders at AVCF and the public at large. Zenon also did not find Complainant's version of the incident to be credible, and that Complainant failed to take responsibility for his actions.
- 51. Zenon considered the memorandum written by the physician's assistant before making a decision regarding Complainant's punishment. He also considered Complainant's previous performance evaluations, one of which was "Outstanding."
- 52. After reviewing all of the written and verbal information, Zenon considered giving Complainant a corrective action and also considered all levels of disciplinary action. Ultimately, Zenon determined that termination was the proper disciplinary action for Complainant, given the severity of Complainant's behavior and his position at DOC.
- 53. Complainant had no prior corrective actions and had one disciplinary action in 1995 or 1996, which was unrelated to alcohol. Zenon did not consider the prior disciplinary action in making his decision to terminate Complainant. Complainant had no prior incidents at work involving alcohol.
- 54. Zenon wrote the letter terminating Complainant's employment on the same day the Rule R-6-10 meeting after the meeting was held. Zenon did not make a decision to terminate Complainant's employment until after considering the information provided in the Rule R- 6-10 meeting.

55. Complainant timely appealed his disciplinary action to the Board.

#### **DISCUSSION**

## I. GENERAL

Certified state employees have a property interest in their positions and may only be terminated for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

#### A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. <u>Department of Institutions v. Kinchen</u>, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. <u>McPeck v. Colorado Department of Social Services</u>, 919 P.2d 942 (Colo. App. 1996).

## II. <u>HEARING ISSUES</u>

## A. Complainant committed the acts for which he was disciplined.

Respondent met its burden of proof of proving that its decision to terminate Complainant was not arbitrary, capricious or contrary to rule or law. Complainant was terminated for violating several provisions of DOC AR 1450-01. Those provisions are:

- IV, J. Professional relationships with colleagues will be of such character as to promote mutual respect, assistance, consideration, and harmony within DOC and with other agencies.
- IV, N. Any action on or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff's ability to perform effectively and efficiently in his/her position, or casts doubt upon the

integrity of the staff, is prohibited. Staff will exercise good judgment and sound discretion.

- IV, X. Staff shall neither falsify any documents or willfully depart from the truth, either in giving testimony or in connection with any official duties or official investigation.
- IV, CC. Staff are required to remain fully alert and attentive during duty hours.
- IV, TT. Use (including under the influence) of alcohol or illicit drugs, or the misuse of prescription drugs, while on duty is prohibited. . . .
- IV, ZZ. Any act or conduct, on or off duty, which affects job performance and which tends to bring the DOC into disrepute, or reflects discredit upon the individual as a correctional staff, or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming, and may lead to corrective and/or disciplinary action.

The credible and undisputed evidence establishes that Complainant drove 80 miles and reported to work in an intoxicated state on April 14, 2005. The credible evidence also establishes that Complainant held a very responsible position at AVCF as its Major and Custody and Control Manager. Given the volatile nature of AVCF's inmate population, it is extremely important that AVCF staff be alert and ready to respond to an emergency at any time. Complainant's state of intoxication on April 14, 2005 put the facility at risk. This was risk was even more pronounced on April 14th because Complainant was essentially in charge at AVCF because Hartley was involved in the ERT challenge and Zenon was occupied with other obligations. Complainant also put the public at risk by driving while three times over the legal limit for drivers. Additionally, Complainant's behavior did not promote respect in his relationships with colleagues at DOC.

# B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it authorized to act in exercising its discretion; 3) exercised its discretion in such a manner after a consideration of evidence before it as clearly to indicate that is action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. Lawley v. Department of Education, 36 P.3d 1239, 1252 (Colo. 2001).

Zenon did not fail to use reasonable diligence and care to procure the evidence he was allowed to consider. To the contrary, he reviewed Kurtz's investigative report

concerning the events of April 14. Zenon also considered the written and oral information provided by Complainant. As stated earlier, the evidence establishes that Complainant drove approximately 80 miles and reported to work on April 14, 2005, in a very intoxicated state. Complainant does not dispute that. Instead, Complainant maintains that he did not intend to come to work while intoxicated, and, in fact, did not know that he was intoxicated when he drove the 80 miles from his home and reported to work on April 14, 2005. Complainant further maintains that he had no alcohol after 9:30 p.m., but the medication he took caused the alcohol to stay in his system for a long period of time. Nothing in the literature Complainant provided regarding his medication supported Complainant's contention that the medication caused alcohol to stay in his system for a longer period of time, or would intensify the level of alcohol in his system. The literature advises consumers of the medication to avoid alcohol while taking the medicine because the alcohol may increase drowsiness or dizziness and that Lorazepam "may increase the effects of other drugs that cause drowsiness, including anti-depressants, alcohol, antihistamines, sedatives (used to treat insomnia), pain relievers, anxiety medicines, seizure medicines, and muscle relaxants."

The memorandum from the physician's assistant at Complainant's doctor's office states that "the combination of the two medications and the interaction of the alcohol will and does prolong and intensify clearance of alcohol as well as the two medications." However, the memo does not state how long the clearance of alcohol would be prolonged, or how it would be intensified. Moreover, the documents submitted by Complainant do not support that statement. Complainant had a breath alcohol level of .178 at approximately 10:30 a.m., 13 hours after Complainant says he was finished drinking alcohol and went to bed. Complainant's contentions are simply not credible, especially given the lack of corroborating evidence to support those contentions. It is also not credible that Complainant did not know he was intoxicated given his level of intoxication and the obviousness of the intoxication to his co-workers.

# C. The discipline imposed was within the range of reasonable alternatives.

State Personnel Board Rule R-6-6, 4 CCR 801, provides, "The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered." The credible evidence establishes that Zenon appropriately weighed the mitigating and aggravating factors in reaching his decision to terminate Complainant. The credible evidence demonstrates that Zenon, as the appointing authority, pursued his decision thoughtfully and thoroughly reviewed all of the evidence, including the information presented by Complainant, before reaching his decision to terminate Complainant as required by Board Rule R-6-6. Complainant argues that Respondent was not in compliance with Rule R-6-6 because the extent and effect of Complainant's conduct did not warrant termination. Essentially, Complainant argues that Respondent did not prove that his

actions put the facility at risk because no harm came as a result of his intoxication. Complainant is mistaken; the very fact that he reported for duty in an intoxicated state put the facility at risk.

Complainant further argues that Respondent violated Rule R-6-6 by failing to consider the mitigating information provided by Complainant. The evidence presented is contrary to this allegation. Zenon testified that he did consider the memorandum from the physician's assistant, as well as Complainant's statements in the Rule R-6-10 meeting. After considering that evidence, he did not find the memorandum or Complainant's statements to be credible, and therefore, not persuasive. Finally, Complainant argues that Zenon made his decision to terminate Complainant prior to the Rule R-6-10 meeting, as evidenced by the fact that Zenon wrote the letter terminating Complainant the same day as the Rule R-6-10 meeting. The evidence established that Zenon did not make his decision until after the Rule R-6-10 meeting. The fact that Zenon made his decision quickly does not mean that he failed to consider all of the evidence presented to him or that he made his decision prior to the Rule R-6-10 meeting.

The credible evidence demonstrates that Zenon pursued his decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances before making his decision to terminate Complainant. Complainant's position at AVCF was one of enormous responsibility. As Custody and Control Manager, Complainant was entrusted with the security of the facility. As such, he needed to be alert and have a keen sense of judgment and be ready to react to an emergency at any time. By reporting to work in an obviously intoxicated state, Complainant compromised the safety and security of the facility and his relationships with his co-workers. He further compromised the safety of the public by driving from Colorado Springs to AVCF while intoxicated. Zenon considered all of these factors in making his decision. Zenon considered all forms of discipline, but concluded that termination was the only appropriate sanction. Zenon did not abuse his discretion. See Board Rules R-6-1, R-6-2, R-6-6, R-6-10, and R-6-9, 4 CCR 801.

#### D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. §24-50-125.5, C.R.S., and Board Rule R-8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

Complainant requested an award of attorney fees in this case. Because he did not prevail in this matter, there is no basis for such an award.

## **CONCLUSIONS OF LAW**

- 1. Complainant committed the acts for which he was disciplined.
- 2. The discipline imposed was within the range of reasonable alternatives.
- 3. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
- 4. Attorney fees are not warranted.

## **ORDER**

Respondent's action is **affirmed.** Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this \_\_\_\_ day of November, 2005.

Hollyce Farrell Administrative Law Judge 633 17<sup>th</sup> Street, Suite 1320 Denver, CO 80202-3604

#### **NOTICE OF APPEAL RIGHTS**

#### EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

#### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

#### **RECORD ON APPEAL**

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is <u>\$50.00</u> (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

#### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 8 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Board Rule 8-73B, 4 CCR 801.

#### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75B, 4 CCR 801. Requests for oral argument are seldom granted.

## **CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_\_ day of November, 2005, I placed true copies of the foregoing INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS in the United States mail, postage prepaid, addressed as follows:

Nora V. Kelly, Esquire 1776 Lincoln Street, Suite 810 Denver, Colorado 80203

and in the interagency mail, to:

Jill M. M. Gallet First Assistant Attorney General Office of the Attorney General 1525 Sherman Street, 5<sup>th</sup> Floor Denver, Colorado 80203